IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPEL**LATE JURISDICTION**

WRIT PETITION NO.5876 OF 2005

Bombay Presidency Radio Club Ltd. .. Petitioners.

Verus.

Pallan Adi Katgara & Anr .. Respondents.

Mr.V.A. Thorat with Peter Lobo and P.L.Bachani i/b I.R. Joshi & Co. for the petitioners.

Mr.D.D. Madon with T.R.Mehta i/b D.Liladhar for respondents.

CORAM: SMT.N.M.MHATRE,J.

DATE : 12TH SEPTEMBER 2005.

P.C.

1. This Petition challenges the Order passed by Appellate Court rejecting the application filed by the Petitioners for restoring the Appeal which had been filed by them in the year 2000. The trial court had decreed the suit on 30th November 1999. The Appeal was lodged by the petitioner on 24th January 2000. It appears that the appeal was pending for removal of office objections. The decree was stayed by an interim order. The appeal was then dismissed on 30th November 2000 since the objections were not removed. It appears that on 23rd November 2004 the respondents issued notice of execution of the decree which was received by the petitioners 26th November 2004

. The petitioners, therefore ere aware of the decree being put into execution in November 2004 itself. They filed an application for setting aside the Order rejecting their appeal in April 2005. On 30th April 2005 this application was rejected since the Advocate for the petitioners was absent when the matter was called. A fresh application was filed on 2.5.05 which was heard and decided on 4.5.05. This application was been rejected by the Appellate court and the order is impugned in the ’ present petition.

2. The submission of the learned counsel for the petitioners is that , the petitioners had no knowledge that the appeal memo had been rejected till they found that decree was being executed. It was , thereafter that the petitioners took search of the proceedings and filed the application for restoring the appeal. It is submitted that although, there has been delay, the petitioners ought not be penalised and prejudiced since they had entrusted their matter to an Advocate. They reasonably expected that he would ensure that all the formalities in the proceedings were completed within time. It is submitted that the petitioner should not be penalised for the fault of their advocate or Advocate’s clerk.

3. On the other the hand the learned counsel for respondent submits that there is no explanation for the delay from 26th November 2004 when the petitioner received notice for executing the decree till 20th April 2005 when the application was first filed for restoring the appeal. He submits that the petitioners had obtained a stay of the decree and were, therefore, not concerned as to whether the appeal had been rejected for non removal of office objections. He, therefore, submits that no leniency should be shown to the petitioners in a Writ Petition filed under Article 227 of the Constitution of India.

4. On consideration of the submissions made at the bar, in my view,the petitioners have certainly being negligent in prosecuting the appeal. The appellate court has found that negligence of petitioner could not be wished away by just blaming the advocate since no office bearer of the petitioners had bothered to remain present in the court when the appeal was to be restored. Appellate court has passed an order that such negligence ought not be condoned.

5. It is well settled now that negligence of an

advocate should not adversely affect the litigant. It is obvious that when the petitioners entrusted their appeal to an advocate in the year 2000, they expected the advocate to remove office objection and to ascertain that all the requirements of law would be completed. In such a situation, the petitioners can not be faulted for having reposed full faith in their advocate. However, there is no doubt that the petitioners ought to have been more vigilant. The interim notice had been argued by the parties and the Appellate Court had heard the same without ascertaining whether the Appeal Memo was on record of the Court. In such circumstances, I am of the view that delay in filing the restoration application should be condoned and the appeal should be restored to file on payment of cost quantified at Rs.15000/-

6. Appeal Memo to be restored subject to removal of the office objections within 3 weeks.

(SMT.N.M.MHATRE,J)